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ALEXANDER L. STEVAS,

82-1734

NO. A-664

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LINDA SIDOTI PALMORE,
Petitioner

v.

ANTHONY J. SIDOTI,
Respondent

WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit a court from considering racial attitudes as one of several factors influencing the welfare of the child for purposes of child custody determinations.

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STATEMENT OF THE CASE

In addition to Petitioner's Statement of the Case, Respondent would show additional factual matters that were brought out at the change of custody hearing; which matters were reflected in the judgment entered by the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida (hereinafter the "Circuit Court"). The primary holding of such judgment being that the best interest of the child (hereinafter "Melanie") would be served by a change of custody to Respondent.

An ear infection periodically inflicted Melanie. Respondent related that medication was necessary to alleviate this problem, but Petitioner's failure to properly administer the medication necessitated the Respondent going to the day care center in order to get it done. Additionally, on two

occasions Melanie had contracted head lice, and Petitioner, during her testimony, exhibited a strikingly casual attitude to the condition. Excerpts of Respondent's testimony concerning these matters are reprinted in Appendix "A" to this brief.

In addition to the head lice testiony, Petitioner testified to the following facts. Melanie is required to spend at least eight hours per day at a day-care center. It was at the day care center that she contracted the head lice from other children. Although her present husband, Clarence Palmore (hereinafter "Palmore") has never previously been married, he has an illegitimate son. Between the time of Petitioner's divorce from Respondent and her marriage to Palmore, Palmore often spent the weekend at Petitioner's; usually, but not always, on week-

ends when Melanie was not present. On one occasion, Melanie joined Petitioner and Palmore in her mother's bed. On at least one other occasion, Petitioner stayed at another man's residence for the weekend, and displayed a markedly hostile attitude when questioned about the incident. Excerpts from Petitioner's testimony concerning these matters are reprinted as Appendix "B" to this brief.

REASONS FOR DENYING THE WRIT

I. THE JUDGMENTS OF THE FLORIDA COURTS ARE NOT SOLELY BASED ON THE CONSTITUTIONAL QUESTION RAISED BY PETITIONER.

Although Petitioner raises a valid constitutional question, if that question stood alone as the basis for the decisions of the Florida courts, this Court lacks jurisdiction because the record clearly shows that the courts

below did not make their decisions on the constitutional issue raised by Petitioner. The decisions of the Florida courts below rest solely upon principles of Florida family law.

This Court has consistently declined to review judgments of state courts which were based on adequate and independent non-federal grounds, even when a federal question could also be at issue. Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Berea College v. Kentucky, 211 U.S. 45 (1908).

In Florida, as in most states, the "welfare of the child" is the "chief consideration" in fixing or modifying custody decrees. Dinkel v. Dinkel, 322 So. 2d 22 (Fla. 1975); New York ex rel. Halvey v. Halvey, 330 U.S. 610 (1947).

Florida courts also consider the extramarital sexual conduct of a parent which may detrimentally affect the

moral and social development of the child. Dinkel v. Dinkel, 322 So. 2d 22 (Fla. 1975); Culpepper v. Culpepper, 408 So. 2d 782 (Fla. Dist. Ct. App. 1982).

The District Court's order, in this case, found that there was substantial evidence of changed circumstances so that Melanie's interests would best be served by granting custody to Respondent. (Petitioner for Certiorari, page 27). The fact finding contained in the order referred primarily to Petitioner's extramarital sexual activities. Additionally, the order referenced Melanie's head lice and the fact that Melanie was in a day-care center eight hours per day. Only collaterally did the order reference the pressures of growing up in an interracial household as a factor affecting Melanie's best

interests. Petitioner's entire post-order activities have addressed only the propriety of the trial court's considering racial factors as even a collateral sense.

This Court has no jurisdiction under 28 U.S.C. Section 1247(3) to review state court decisions based on state law. Alton R. R. Co. v. Illinois Commerce Commission, 305 U.S. 548 (1939). A decision of a trial court, if it is correct for any reason, is not to be reversed on appeal even though the trial court may add additional erroneous or insufficient reasons to its decision. Escarra v. Winn Dixie Stores, Inc., 131 So. 2d 493 (Fla. 1961). In custody matters, factual determinations concerning "the best interests of a child" may not be reversed except upon a showing of a clear abuse of discretion. Pinkel v.

Dinkel, 322 So. 2d 22 (Fla. 1975). The primary evidence concerning Melanie's moral and health environment in addition to the possibility of the lack of adequate parental attention by Petitioner was competent and substantial evidence upon which to sustain the Circuit Court's order. There was no reason for the District Court of Appeals to address Petitioner's constitutional claim.

II. THE DECISIONS BELOW DO NOT CONFLICT WITH ANY FEDERAL OR STATE COURT HOLDING PROHIBITING CONSIDERATION OF COMMUNITY, PRIVATE OR GENERAL RACIAL ATTITUDES IN DETERMINING THE BEST INTERESTS OF THE CHILD

Any claim that the Fourteenth Amendment prohibits a state from considering racial attitudes in determining the child's welfare was specifically raised, and rejected, in Drummond v. Fulton County Dept. of

Family and Children's Services, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).

Petitioner refers this Court to cases from Pennsylvania and Michigan which dealt with the consideration of racial factors in custody litigation. (Petition for Certiorari, page 18, nn.2&3). It is significant that none of the cited cases was based on the Fourteenth Amendment objection. These cases, at best, illustrate that those states have made policy decisions that race will not be considered a "relevant" factor in considering "best interests of a child." As such, those cases involve state policy matters within family law, not federal constitutional law.

III. ASSUMING PETITIONER'S ARGUMENT, THE FEDERAL QUESTION RAISED IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

Even if the record in this case were sufficient to establish that the decision below rested partly upon a federal question, that fact alone does not necessarily create conflict with decisions of this Court.

This case is substantially different from Santosky v. Kramer, 102 S. Ct. 1388 (1982), in that case the state, rather than an individual, initiated the proceedings to deprive a parent of any interest in the child. In this case, they were commenced by Respondent, who, as Melanie's father, has interests in Melanie as fundamental as those of Petitioner. Stanley v. Illinois, 405 U.S. 645 (1972). Santosky is also distinguishable in that the change involved a permanent

termination of parental interests. Petitioner here has been granted visitation rights, and could possibly regain custody of Melanie upon a showing that the child's best interests would be served by the mother regaining possession.

By considering broad general racial attitudes of the anticipated environment of the child, as only one factor among many affecting the best interests of the child, the State of Florida does not seek to punish interracial marriage, as in Loving v. Virginia, 388 U.S. 1 (1967), or interracial cohabitation, as in McLaughlin v. Florida, 379 U.S. 184 (1964).

In acknowledging the realities of contemporary American life, the state of Florida does not necessarily violate the constitutional strictures against racial discrimination. Drummond v.

Fulton County Dept. of Family and Children's Services, 563 F.2d 1200, 1205 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).

Furthermore, the recognition that children raised in an interracial household may encounter stresses not imposed upon children in single-race households applies equally to all children and parents, regardless of their races. Petitioner suggests that:

> Judicial concern over the effect of an interracial marriage appears to arise only when the child is white.

(Petition for Certiorari, page 13, n.1). This statement is erroneous to the extent that courts have considered the effect of interracial households on the welfare of black children. See, e.g., Dickson v. Lascaris, 97 Misc. 2d 610, 411 N.Y.S. 2d 995 (Fam. Ct. 1978); In re Matter of R. Children, 89 Misc. 2d 493, 391 N.Y.S. 2d 812 (Fam. Ct.

1977). The fact that two cases, the instant case and Niles v. Niles, 299 So. 2d 162 (Fla. Dist. Ct. App. 1974), involved white children does not indicate that all Florida courts, or even the courts now under scrutiny, intend to apply the racial consideration in a discriminatory manner. The standard as such is facially neutral and equally applicable to all races, and there is no evidence on the record that it was applied in a discriminatory fashion, or is there a showing that the general policy was adopted for discriminatory purposes. Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977).

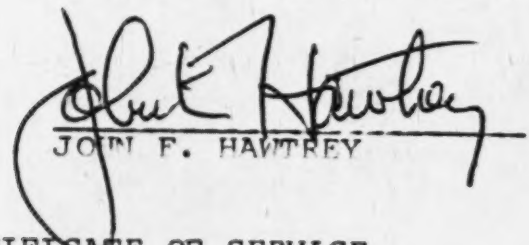
Additionally, if a state court decision could conceivably be based on either state or federal law, this Court should decline review unless the record

affirmatively establishes that a decision of the federal question was necessary; that the federal question was actually decided; and that the judgment, as rendered, could not have been issued without the decision of the federal question. Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934); McGoldrick v. Gulf Oil Corp., 309 U.S. 2 (1940). Petitioner merely surmises from the abstracted quotations as given in his brief that the state courts may have rested their decisions on federal questions. Such a surmise is not sufficient to support a request for review by this Court. Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

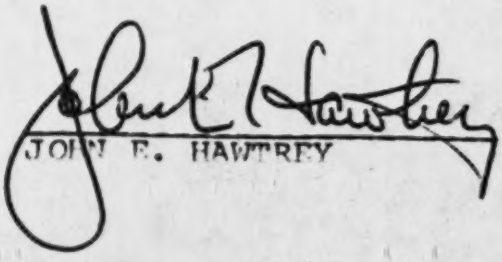
Respectfully submitted,



JOHN F. HAWTREY

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 1983, three copies of the foregoing Respondent's Brief in Oppostion were furnished by mail, correct postage prepaid, to Robert J. Shapiro, Esquire, SPECTOR & SHAPIRO, 201 East Kennedy Boulevard, Suite 924, Tampa, Florida 33602.



JOHN F. HAWTREY

APPENDIX A

[Excerpts from pages 6-8 and 11 of Respondent's testimony.]

[7]

[MR. SIDOTI] . . . There was an incident of when Melanie would be sick, she had an ear infection for a long time. I took her to the doctor on the weekend that I had her and a few times I had even picked her up in the middle of the week and taken her to the doctor for this.

And I have gotten her medication. He has given her eight

[8]

shots and I give her the medication when I have her, but I took the medicine home to Linda to give to her and she never got the medicine, because this problem just keeps going on until Ifinally took it to the day-

care center where they were giving it to her twice a day.

And we took some to Linda where she would give it to her once a day, if she give it to her. That's the only way she got over this infection, was because the day-care center gave it to her twice a day.

* * *

[6]

[MR. SIDOTI] . . . And there was several accounts where she had lice in her hair.

[MR. CARLTON] Did you have to treat her for that?

[MR. SIDOTI] Yes, I treated her for it.

[MR. CARLTON] How many different times?

[MR. SIDOTI] I treated her for it twice and I took her to a doctor the

third time and had him treat her, and get a letter, and affidavit that he saw her and treated her.

* * *

[11]

[MR. CARLTON] Mr. Sidoti, with reference to the head lice, did you call the child or did you call Linda?

[MR. SIDOTI] Yes, i did.

[MR. CARLTON] What response or attitude did she reflect?

[MR. SIDOTI] She was not, didn't seem to be concerned about it. She said she'd had them before.

* * *

APPENDIX B

[Excerpts from pages 8, 11, 14, 18, 19, and 26 of Petitioner's testimony.]

[18]

[MR. SHAPIRO] There wan [sic] an allegation that the child was in bed with you and Mr. Palmore. Could you explain what happened there?

[MRS. PALMORE] This was a weekend that Tony had to work and he called me and said he had to work and said he

[19]

was going to change that weekend to the next weekend because his shift didn't permit it and Clarence only stayed with me. The allegations were that I was living with a black man, he was staying with me on the weekends she was gone. So that she would not be around. This time it just happened he was there and we were taking a nap and

she, as a breastfed child had slept with me for many, many months and at certain times, because of the apartment I had to get, she had to sleep with me before I was married. She woke up, came in, got in bed right against me and when I realized she was in bed with me, I took her back.

* * *

[26]

[CARLTON] Except for Clarence, wasn't there one other black male that stayed there some weekends?

[MRS. PALMORE] No. I stayed at his apartment.

[CARLTON] At Clarence's apartment?

[MRS. PALMORE] No. The other black male you are talking about.

* * *

[8]

[MR. SHAPIRO] Where does she spend her days?

[PALMORE] She spends approximately eight hours in day care, Highway 92, Small World Day Care.

* * *

[11]

THE COURT: How old is his son?

[PALMORE]: Fifteen months.

THE COURT: Is that from a former marriage?

[PALMORE]: No, he was never married.

THE COURT: I see. How old is he?

[PALMORE]: He is twenty-five.

THE COURT: All right. Go ahead.

* * *

[14]

[MR. SHAPIRO] Mr. Sidoti mentioned head lice. Could you describe the occasions on which Melanie

had lice, and what you did about it, how you learned about it?

[MRS. PALMORE] I learned about it from the day-care instructor, Sharon MaDula (phonetic), who when I take her in the morning--we didn't notice any scratching the previous night. That afternoon, I go to pick her up and Sharon would tell me, she has head lice, several of the kids had head lice. You are to treat her or she cannot come to the day care tomorros unless you treat her.